S.B.CIVIL MISC. APPEAL NO.722/1997
(Dilip Singh Vs. Mohan Lal & Anr.)

Date of order : : 06.12.2007

HON'BLE MR. KRISHAN KUMAR ACHARYA, J.

Mr.R.K.Thanvi, for the appellant.
Mr.Mr.S.P.Sharma, for the respondent No.1.
Mr.Mohan Lal, present in person.

This appeal has been filed against the order dated 8.8.1997 passed by Additional District Judge No.3, Jodhpur (hereinafter referred to as " the trial court") by which learned trial judge has dismissed the application of the appellant filed under Order 9 Rule 13 read with Section 151 CPC for setting aside the ex parte decree passed in civil original suit No.69/89.

Briefly stated the facts are that respondent No.1 Mohan Lal has filed a civil suit before the learned trial court for specific performance of the agreement against the appellant- Dilip Singh as well as respondent No.2 Mohammad Ismile. It was stated that agreement was entered into between Mohan Lal and Dilip Singh; and Mohammad Ismile stood as guarantor. The learned trial court has passed joint ex-parte decree against the defendants (the appellant and the respondent No.2) vide order dated 27.5.92.

The appellant-defendant has filed an application before the trial court for setting aside ex-parte decree on the ground that service was not effected upon him nor he received any registered notice. In reply, respondent-plaintiff has submitted that notices were sent to both the defendants by Court through registered post and same were received by them but notices were not returned back. The respondent No.2 did not file any reply. After recording the evidence, learned trial court has dismissed the application of the appellant under Order 9 Rule 13 CPC on 8.8.97 by holding that service of notice is sufficient as per provisions of Order 5 Rule 19-A CPC.

For setting aside of the ex-parte decree, appellant has to establish either no summon was served on him or he had sufficient cause for remaining absent on the date fixed for hearing the suit ex-parte. In the present case, it is revealed from the order-sheets of the trial court that summons were sent to the appellant herein by the Registered Post but summons were not returned and the matter was heard ex-parte by the trail court while treating the service complete upon the appellant herein. The learned trial Judge after discussing evidence reached to the conclusion that service is sufficient as per provisions of Order 5

Rule 19-A CPC.

On 29.11.2007, both the parties argued the matter at length on merit. However, today learned counsel for the parties states that both the parties settled their dispute out of the court that if appellant pays Rs.10,000/- cost to the respondent No.1, ex-parte decree passed against him as well as respondent No.2 may be set aside and suit may be ordered to be decided on merit.

The plaintiff-respondent No.1 Mohan Lal is present in person today. He admits that he has received Rs.10,000/- as cost, therefore, the ex-partee decree may be set aside against the appellant.

I have considered the submissions advanced by learned counsel for the parties. The appellant and respondent No.1-plaintiff have agreed that if appellant pays Rs.10,000/- to the plaintiff-respondent No.1 as cost then ex-parte decree may be set aside and the plaintiff, who is present today in the Court, admits that he has received cost of Rs.10,000/- and he has no objection if ex-parte decree passed against the appellant is set aside. Since the respondent No.2 has not challenged the said ex-parte decree nor he has appeared before this Court and in view of provisions of Order 9 Rule 13 CPC, two decrees cannot be

stand, therefore, ex-parte decree passed against the respondent No.2 will also be set aside.

Looking to all the facts and circumstances of the case as also the settlement arrived in between the parties, this civil misc.appeal is allowed and the order passed by learned trial court on 8.8.1997 is set aside. The ex-parte decree dated 27.5.1992 passed against the appellant as well as respondent No.2 is also set aside. Learned trial court after taking the written statements, if any filed by the parties as well as after framing issues and after giving opportunity to both the parties to lead their evidence shall decide the suit in accordance with law. Learned trial court is also directed to expedite and complete the trial of the suit preferably within a period of six months from the date of receipt of this order. There shall be no order as to cost of this appeal.

The parties are directed to appear before the trial court on 21.1.2008. A copy of order along with record of the case be sent to the concerned trial court immediately.

(KRISHAN KUMAR ACHARYA), J.

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